No. 48927-9-II

DIVISION II OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

RICHARD BOYD,

Appellant,

v.

CITY OF OLYMPIA, ET AL,

Respondent,

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

1. Statutory Interpretation

The City attempts to have this Court sidestep the guiding principal of construing the Industrial Insurance Act liberally, with all doubts in favor of the injured worker. However, there is no dispute that Richard Boyd had an occupational injury and was entitled to benefits under the Industrial Insurance Act. There is no dispute that Richard Boyd was a "beneficiary" under the Industrial Insurance Act. The main issue in the present case is whether the Department's February 18, 2014 Order was timely protested and should have been held in abeyance until a subsequent order was issued. Accordingly, the present case involves in large part *interpretation* of the Industrial Insurance Act – concerning a person (Mr. Boyd) who had already held the title "beneficiary" under the IIA.

2. Valid Protest

a. The Protest Record

The City's philosophical analysis of whether the protest record meets the *In Re Lambert* test clearly over complicates and convolutes what is a simple test: Did the Department receive a written document that was reasonably calculated to put it on notice that the party submitting the document is requesting action inconsistent with the Department's decision?

See In Re: Mike Lambert, BIIA No. 91-0107 (January, 1991). The protest is not required to reference a claim number, or the employer, or the closing order. *See In Re: Mike Lambert, BIIA No. 91 0107 (January, 1991)* The SIE received the protest record. They received it within 60 days of the Department's Order. The protest record called for additional care related to Mr. Boyd's left hip. The protest record was sent to SIE. (CABR 602 - The SIE has admitted that on March 28, 2014, claims manager Fleischman wrote a letter to Dr. Roa stating they received his chart note *and bill* after the February 18, 2014 closing order was issued.)

The City argues that given certain information had by Carrie Fleischman before she received Dr. Roa's chart note (i.e. a 1/15/14 "concurrence report" from Dr. Green), she "could not reasonably interpret the chart note as a protest" of the Department's January 27 and February 18, 2014 orders. However, the question is not whether she interpreted it as a protest – but rather whether the protest document was reasonably calculated to put the Department on notice that the party submitting it is requesting action inconsistent with the decision of the Department.

It bears noting that on the face of the protest record it states in part: "He had arthroscopic labraldebridement **in early 2012**, and last met me for a diagnostic hip injection. He did get several months of benefit from the

surgery, but **the pain has since returned**, maybe more severe than before. His **history is complicated somewhat by back pain and suspected lumbar radiculopathy**, affecting the calf, causing atrophy, for which he's seen Dr. Michael Lee." CABR 589 & 111. [Bold emphasis added].

This record clearly refers to a procedure from 2012, pain that has "since returned", and even mentions that his history is complicated by *back pain*. Such language – together with the fact that this record also indicates on its face "occupational health", that the chief complaint was "**Ongoing L hip**, referral by Dr. Green" and a plan for additional care – clearly establishes that it was reasonably calculated to put the Department on notice that the party submitting it is requesting action inconsistent with the decision of the Department.

b. "Extrinsic Evidence"

The following were ALL part of the Certified Appeal Board Record:

(1) Dr. Roa's protest record of February 13, 2014 (CABR 588-592, 110-114); *See also CABR 481-485*; - not excluded by Board or Superior Court.

(2) The Insurer Activity Prescription Form dated January 8, 2010 (CABR 118 & 186);

(3) The May 14, 2010 South Sound Neurosurgery record excerpt (CABR 71 & 139);

(4) The July 1, 2011 Dr. Green record excerpt (CABR 73 & 141);

(5) The October 25, 2011 UW Medical Center record excerpt (CABR 75 & 143);

(6) The January 26, 2012 UW Medical Center record excerpt (CABR 77 & 145);

(7) The Dr. Sherfey, MD IME report excerpt (CABR 97 & 165);

(8) The September 24, 2013 Dept of Orthopedic & Sports Medicine record excerpt (CABR 79, 85) *See also CABR 475*; - Not excluded by Board or Superior Court.

(9) Requests for Admissions 1,3,4,5,14,15 (CABR 594, 595, 595, 596, 599, 599, respectively) and the City's responses thereto (CABR 594, 595, 595, 596, 599, 599 respectively), *see also CABR 487-496;* - not excluded by Board or Superior Court.

(10) The January 2, 2014 and January 10, 2014 letters by SIE counsel (CABR 84, 87-88). - Not excluded by Board or Superior Court.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment – are not excluded by the hearsay rule. ER 803(a)(4). (*i.e. 1, 2, 3,4,5,6, and 8 above*.).

Documents 1 and 8 above were not excluded by the Board or the Superior Court. Documents 2, 3,4,5 and 6 above are the type of documents that SIE claims administrators or Department claims managers consider when adjudicating claims. If the SIE considered the records in its adjudication of the claim, it should be estopped from attempting to preclude the injured

worker from asking the Board or higher courts from considering them as well. Moreover, documents 1,2, 3,4,5,6 and 8 above were provided **to the Board** attached to a Declaration of Ron Meyers providing that each of the documents were a "true and correct copy". *See CABR 67-69.* Furthermore, the Claimant's Response to the SIE's Motion for Summary Judgment before the Board specifically states:

> "This motion is based on the declaration of Ron Meyers and exhibits thereto, a copy of page 2 of the Board of Industrial Insurance Appeal's Jurisdictional History, a copy of the February 13, 2014 chart note from Ashwin Rao, MD, Dr. Green's September 24, 2013 chart note, the SIE's answers to Claimant's Requests for Admissions, **the records of the SIE and the Department**, and the pleadings filed in this matter." [emphasis added]

A statement is *not* hearsay if "The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *ER 801(d)(2);* (i.e. documents 7, 9, and 10 above and Appendix A to Appellant's Opening Brief).

Documents and 9 and 10 were not excluded by the Board or the Superior Court.

Document 7 was provided **to the Board** attached to a Declaration of Ron Meyers providing that each of the documents were a "true and correct copy". *See* CABR 68-69; Moreover, statements from the SIE's defense medical expert clearly fall within ER 801(d)(2).

The City's attempt to preclude various documents (deemed by the City as "extrinsic evidence") from consideration is misguided. The Superior Court reviews the Board's action **de novo**, and relies on the **certified Board record**. Each of the documents referenced in 1 through 10 above are part of the certified Board record.

> In reviewing a BIIA decision under the Industrial Insurance Act (IIA), the superior court considers the issues de novo, **relying on the certified board record.**

Malang v. Dep't of Labor & Indus., 139 Wash. App. 677, 683, 162 P.3d 450, 453 (2007) [Bold emphasis added]. Moreover,

> The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board **or included in the record filed by the board in the superior court** as provided in RCW 51.52.110: . . .

RCW 51.52.115. [Bold emphasis added].

"Appellate review is limited to examination of **the record** to see

whether substantial evidence supports the trial court's findings and whether its conclusions flow from the findings. RCW 51.52.140; *Young v. Department of Labor & Indus.*, 81 Wash.App. 123, 128, 913 P.2d 402, review denied, 130 Wash.2d 1009, 928 P.2d 414 (1996); Garrett, 45 Wash.App. at 339, 725 P.2d 463." *Ruse v. Dep't of Labor & Indus.*, 90 Wash. App. 448, 453, 966 P.2d 909 (1998), aff'd, 138 Wash. 2d 1, 977 P.2d 570 (1999). [Bold emphasis added]. The City relies heavily on Dr. Roa's Declaration obtained by the City. First, this Declaration was not even signed by Dr. Roa until February 24, 2015 **roughly one year after** the Department obtained Dr. Roa's **February 13, 2014** protest record.

In its significant decision of *In Re: Mike Lambert,* the Board stated that, "Upon **receipt** of the October 4, 1990 letter, June Gorky knew, or should have known, that the claimant was disputing the Department's right to share in his third party recovery and was thereby aggrieved by the order of September 7, 1990." [bold emphasis added]. *In Re: Mike Lambert, BIIA number 91 0107 (1991).*

Second, Dr. Roa does *not* state in his February 24, 2015 Declaration that Mr. Boyd's hip symptoms are *not* related to the industrial injury covered under claim no. SC-77017. CABR 559-560. Rather, he states that "I have no opinion as to whether or not Mr. Boyd's hip symptoms are related to the

industrial injury covered under Claim No. SC-77017 on a more probable than not basis." *Id.*

The SIE, in support of its Motion for Summary Judgment at the Board, produced an Affidavit of Carrie Fleischman, who identified herself as a Senior Integrated Claims Examiner with Matrix Absence Management, Inc.. CABR 352. Regardless of whether Dr. Roa "intended" for his chart note and bill to serve as a protest, why would Dr. Roa forward his February 13, 2014 chart note *and bill* to the SIE's agent Matrix Absence Management Inc.? Common sense would dictate that when Dr. Roa forwarded the chart note and bill to the SIE's agent, he felt that the treatment (a) was covered under the claim and (b) he wanted the SIE to pay on his bill. This is the same common sense that should have been employed by the SIE administrator when she received the chart note and bill.

Once it receives the protest record, the SIE should not get to take a second or third bite at disavowing the protest by sending a post-protest inquiry to the protesting doctor. The SIE should send it to the Department, and the injured worker should benefit from the automatic set-aside of the Department's order.

3. The Protest Record Was Received After the Department Order

Per the protest record, Mr. Boyd was to follow up in four to six

weeks for another visit and continue home exercise physical therapy. CABR 588-592; 110-114. *See also CABR 481-485.* Clearly, four-to-six weeks from the February 13, 2014 visit goes beyond the February 18, 2014 Department Order. Moreover, it is highly unlikely that Mr. Boyd was only supposed to continue home physical therapy for five days. Carrie Fleischman received Dr. Rao's protest record and bill on *February 24, 2014.* CABR 354. This is after the February 18, 2014 Department Order. Moreover, it was Dr. Roa that forwarded the protest record and bill to the SIE's agent Matrix Absence Management, Inc.

The Dr. Roa protest record (a) ran counter to the Department's order, and (b) put the SIE on the notice required by *In Re: Mike Lambert.*

The SIE should be estopped from arguing that the Department has to issue an order placing its February 18, 2014 order in abeyance for there to be an abeyance – because based on review of the jurisdictional history, the SIE *failed to send the protest record to the Department. CABR 81-82.*

> "An examination of WAC 296-20-09701 clearly reveals that it was intended as a delegation of authority by the Department to **self insured employers to receive, on behalf of the Department, attending doctors' requests for reconsideration** based on medical reasons. Since the delegation was created through the rule-making process, all interested parties and those whose rights may be affected were put on notice of the **Department's intent to essentially make self-insured employers the Department's agent for receipt of requests for reconsideration** made by attending

physicians for medical reasons, in self-insured claims."

In Re: Harry D. Pittis, BIIA number, 883651 (1989). [Bold emphasis added].

> "It has long been our understanding of the law of this state, as well as the administrative policy of the Board, that a "protest or request for reconsideration" filed with the Department in response to the admonitory language in the order **automatically operates** to set aside the Department's order **and hold in abeyance** the final adjudication of the matter until the Department officially acts to issue its final decision by a "**further** appealable order.""

[Bold emphasis added]. *In Re: Santos Alonzo, BIIA number 56,833 & 56,833A (1981).* See also *In Re: John a. Robinson, BIIA number 59,454 & 59, 454A (1982).* The SIE should not benefit from its failure to send the protest to the Department.

4. Judicial Estoppel

First, "The purpose of judicial estoppel is to bar as evidence statements and declarations by a party which would be contrary to sworn testimony the party has **given in the same** or prior judicial proceedings." *King v. Clodfelter*, 10 Wash. App. 514, 519, 518 P.2d 206 (1974). [Bold emphasis added].

Second, the SIE attempts to shift the focus away from the prior SIE position taken, by framing the issue as that of Mr. Boyd trying to "create a right" through equitable estoppel.

However, judicial estoppel is not about Mr. Boyd "creating a right"

but rather: "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d 13 (2007).

The focus should remain squarely on the SIE and the SIE should be judicially estopped from challenging Dr. Roa's February 13, 2014 record as a protest record.

5. Mr. Boyd's Notice of Appeal was not untimely and the matter is still before the Department.

> "Once the Department has exercised its authority to hold a prior order in abeyance, it may not reverse the abeyance order and attempt to avoid its responsibility to issue a further order. Orders of the Department become final and binding on the parties **if not protested** or appealed within 60 days of communication of the orders. RCW 51.52.050; *Marley,* 125 Wn.2d, at 538. **Once the Department has held an order in abeyance,** whether on its own motion as authorized by statute or in response to a timely protest and request for reconsideration, that order can no longer become final and binding and **it is not necessary for any party to file a further protest or an appeal.**"

In Re: Tonga G. Petersen, BIIA number 12 10440 (2012). [bold emphasis added]. RCW 51.52.050 provides in part:

> "The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties **unless**

> a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia. . . ."

RCW 51.52.050 [Bold and underlined emphasis added].

The February 18, 2014 Department order was protested. The protest was submitted to the SIE agent within sixty days of the date of the Department's order. The SIE should have sent the protest record to the Department. The February 18, 2014 Department order should have been held in abeyance.

The Board and the Superior Court *narrowly construed* the Industrial Insurance Act – and resolved doubt in favor of the SIE – rather than the injured worker. Our State Supreme Court has held:

> "The legislature has instructed us that the act "**shall be liberally construed** for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To accomplish the legislative objective, our " 'guiding principle in construing provisions of the Industrial Insurance Act is that **the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.**' " *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 811, 16 P.3d 583 (2001) (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987))."

Michaels v. CH2M Hill, Inc., 171 Wash. 2d 587, 598, 257 P.3d 532 (2011).

[bold emphasis added].

The SIE should have submitted the protest record to the Department and the Department's order should have been set aside. The injured worker has no obligation or deadline for filing a notice of appeal in that situation, because as we know from *In Re: Tonga G. Petersen,* once the Department has held an order in abeyance, that order can no longer become final and binding and it is not necessary for any party to file a further protest or an appeal.

The Industrial Appeals Judge and the Board lack jurisdiction. There was no appeal deadline, and Mr. Boyd's appeal was neither required nor "late."

6. Documents should be considered by the Superior Court and This Court.

See section 2(b) above.

II. CONCLUSION

The February 13, 2014 Dr. Roa protest constitutes a protest of the Department's closure order. The SIE should have submitted it to the Department and the Department's order should have been placed in abeyance. There should be no "appeal deadline" until after the Department issues a final appealable order.

Firefighter Boyd is entitled to full benefits under the law, up to and

including pension. The Board and Superior Court should be reversed. This case should be remanded back to the Department because the Board lacks jurisdiction.

DATED: November 25, 2016

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DECLARATION OF SERVICE OF APPELLANT'S REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Appellant's Reply Brief; and
2. This Declaration of Service.

ORIGINALS TO:
David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II

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DATED this 25th day of November, 2016, at Olympia, Washington.

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